MOHD SOBRI CHE HASSAN v. PIHAK BERKUASA TATATERTIB MAJLIS PERBANDARAN SEBERANG PERAI & ANOR

HIGH COURT MALAYA, PULAU PINANG
ROZANA ALI YUSOFF J
[JUDICIAL REVIEW NO: 25-21-02-2014]
10 JULY 2024

Abstract – *(i) When an employee is unlawfully dismissed and subsequently reinstated through judicial review, the damages awarded should be limited to the period of wrongful dismissal, not extending beyond the date of the final court order; (ii) An unlawfully dismissed employee is not automatically entitled to retirement benefits if they would have reached retirement age during the period of reinstatement. Such benefits are typically contingent on continuous employment until the retirement date; (iii) Promotion and retirement benefits are discretionary and not automatic entitlements; (iv) An employee who is unlawfully dismissed and reinstated is generally not entitled to pension or gratuity if the reinstatement period is insufficient to meet the eligibility requirements for such benefits; (v) An unlawfully dismissed employee may be entitled to a Golden Handshake and the accumulation of unused vacation leave, but these benefits are typically limited to the period of wrongful dismissal.*

DAMAGES: *Assessment – Unlawful dismissal – Applicant dismissed from employment – Judicial review at High Court unsuccessful – Court of Appeal set aside decision of High Court and granted applicant's prayers in judicial review application – Federal Court modified order of Court of Appeal – Decision to quash shall only render applicant in employment from date he was unlawfully dismissed up to date of delivery of judgment – Whether applicant entitled to claim for damages from date of unlawful dismissal until date of decision of Federal Court – Whether applicant entitled to claim for damages from date of his unlawful dismissal until he was deemed to retire upon attaining age of 60 – Whether applicant entitled to claim for damages from date he was deemed to retire to claim pension benefits payable to him or his wife after his demise*

DAMAGES: *Assessment – Unlawful dismissal – Claim for salary and allowances, bonus, damages, benefits and legal fees and disbursements incurred – Whether claim substantiated – Period applicant entitled to claim*

The applicant was employed by the second respondent as an engineer by way of a contract of service. After the confirmation of his service, the applicant was transferred from the Engineering Department to the Health Services Department. Dissatisfied, the applicant challenged the said transfer, at the High Court, on the grounds that the second respondent was in breach of the

employment contract as the work was not within his scope of expertise. The High Court dismissed the suit. The first respondent then initiated disciplinary proceedings against the applicant as he turned up late for work. The applicant was found guilty and in addition to a warning, the applicant's annual salary increments was deferred for 12 months. The applicant's application for a judicial review at the High Court was unsuccessful. Allegations later sprung that the applicant had raised the matter of his transfer to the State Assemblyman of Penang who, in turn, brought up the issue during the sitting of the Penang State Assembly. The applicant was charged, pursuant to reg. 4(2)(h) of the General Orders and Public Officers Regulations (Conduct and Disciplinary Rules) 1995 ('1995 Regulations'), for purportedly applying external influence to achieve a personal aim. The applicant was found guilty of the charge and dismissed from the second respondent's employment on 28 November 2013. It was against his dismissal that the applicant filed the second judicial review at the High Court. The High Court dismissed the applicant's action but upon appeal, the Court of Appeal set aside the decision of the High Court on the ground that the said dismissal was tainted with procedural impropriety. The Court of Appeal granted the following prayers in the applicant's judicial review application: (i) a *certiorari* to quash the decision of the first respondent; (ii) an order for damages and that damages be assessed ('prayer 4'); and (iii) costs in the cause ('order of the Court of Appeal'). The appeal by the respondents was dismissed by the Federal Court with a modification to the order of the Court of Appeal. The Federal Court upheld the grant of *certiorari* quashing the decision of the first respondent in dismissing the applicant. However, the decision to quash shall only render the applicant in the employment of the second respondent from the date he was unlawfully dismissed, on 28 November 2013, up to the date of the delivery of the judgment. The Federal Court also upheld prayer 4. Hence, the present application. The applicant prayed for the following damages: (i) salary and allowances, from 3 December 2013 till 20 October 2019, in the amount of RM397,090.70; (ii) bonus for the years 2013 till 2019 in the amount of RM30,944.72 and from 2020 till 2035 in the amount of RM116,586.30; (iii) salary and allowances, from 21 October 2019 till 15 December 2035, in the amount of RM1,617,892.55; (iv) damages for loss of promotion and its increments in the amount of RM15,000; (v) gratuity in the amount of RM261,464.23; (vi) Golden Handshake in the amount of RM53,962.44; (vii) pension payable to the applicant in the amount of RM5,216.24 per month, from 16 December 20135 till April 2040 (life expectancy of 64.4 years); (viii) pension payable to the applicant's wife in the amount of RM5,216.24 per month, from May 2040 till July 2042 (life expectancy of 66.6 years); (ix) embarrassment, anguish and suffering in the amount of RM500,000; and (x) legal fees and disbursements incurred up till date, *ie*, proceedings at the High Court, Court of Appeal, leave application at the Federal Court and appeal at the Federal Court, and costs in the assessment proceedings to be as per legal fees and disbursements

incurred and/or payable in respect of assessment proceedings. The issues that arose for determination were: (i) whether the applicant was entitled to claim for damages from the date of his unlawful dismissal, which was from 28 November 2013, until the date of the decision of the Federal Court on 21 October 2019; (ii) whether the applicant was entitled to claim for damages from the date of his unlawful dismissal, which was from 28 November 2013, until he was deemed to retire upon attaining the age of 60 years on 15 December 2035; and (iii) whether the applicant was entitled, from the date he was deemed to retire, to claim pension benefits which is payable to the applicant, or his wife, after the demise of the applicant.

Held (allowing application in part):

(1) The damages awarded by the Court of Appeal in prayer 4 was related to the wrongful dismissal where a *certiorari* was ordered. Logically, the applicant's employment with the respondent continued as usual. Thus, at this juncture, the damages awarded therefore must be in relation to the wrongful dismissal and not beyond. On 26 March 2018, the Federal Court had granted a stay of execution of the Court of Appeal's judgment dated 12 October 2017 until the final disposal of the appeal to the Federal Court. Since there was no longer a continuity of the applicant's service as it had ceased on 22 October 2019, and as the Federal Court had upheld Prayer 4, such order for damages to be assessed was related to the employment of the applicant until 21 October 2019 which was in respect of the duration of the wrongful dismissal. In other words, there was no continuity in service of the applicant after the date of the Federal Court judgment that rendered the applicant to be entitled to any consequential benefits thereafter. Thus, in assessing the damages, it was not open for this court to hold that the applicant was deemed to retire upon attaining the age of 60, on 15 December 2035, and subsequently entitled to claim for damages from the date of his unlawful dismissal, which was from 28 November 2013, until the applicant reach the retirement age of 60 years old. Therefore, the applicant was not entitled to claim for damages from the date of his unlawful dismissal, which was from 28 November 2013, until he was deemed to retire upon attaining the age of 60, on 15 December 2035. (paras 38 & 39)

(2) The applicant was entitled to be paid the bonus for the year 2013 until 21 October 2019 with a total gross salary with annual increment from 2 December 2013 until 21 October including bonus which amounted to RM428,035.42. (para 45)

(3) Regulation 39(1) of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 provides that the promotion of an officer is based on merit. Thus, promotion is an advancement in rank, grade or both and it is at the discretion of the Promotion Board.

A On this score, an employee, including the applicant, does not have a right to be promoted since it is a matter of discretion as specified in reg. 39. The applicant's claim under this heading was dismissed. (para 46)

B **(4)** Pursuant to the judgment of the Federal Court, the applicant was no longer in the employment of the second respondent. Since the Federal Court did not put the applicant in continuous employment on the same terms and conditions, that he previously enjoyed in his employment with the second respondent, the issue of the applicant applying for early retirement or continuing in the employment until he attains the C retirement age of 60 did not arise. The applicant's claim under this heading was dismissed. It followed that the entitlement of his pension by his wife after the applicant's demise, as claimed, was also dismissed. (para 47)

D **(5)** The applicant had been in the service of the second respondent from 1 July 2002 until 21 October 2019 only, which was 17 years 3 months 20 days. There is no provision in the Statutory and Local Authorities Pensions Act 1980 ('SLAP') for payment of pension or gratuity when the applicant ceased to be in the service of the second respondent on 21 October 2019. Thus, the issue of the applicant being entitled to E pension and gratuity did not arise as there was no 'deeming fiction' in the SLAP that the pension, gratuity and other benefits accrued in favour of the applicant automatically by such fiction. The applicant could not also be deemed to be continuing in service till he attains the age of retirement. The damages under this heading was dismissed. (para 50)

F **(6)** Due to the unforeseen circumstances which led to the unlawful dismissal of the applicant, he had been deprived of the opportunity to apply for the accumulation of the unused vacation leave only with respect of the duration from 2 December 2013 until 21 October 2019 and not beyond. The applicant was entitled to Golden Handshake subject to number of G days but limited to 150 days only, calculated from 2013 until 21 October 2019 of his unused maximum of 15 days/annually. The Golden Handshake was in the amount of RM12,400.80. (para 52)

(7) All employees of the second respondent received free medical treatment in all Government hospitals and health clinics. If the applicant had H undergone medical treatment and incurred expenditure, he was to produce any bills and receipts for any reimbursement which, in this case, was absent and not proven. The claim for loss of medical benefits was dismissed. (para 53)

I **(8)** According to the applicant, he had suffered major embarrassment among his peers due to the alleged external influence by the applicant to advance a claim related to public service which he was ultimately

punished with dismissal. Due to the unfair dismissal, the applicant submitted that he suffered emotionally as he had to attend various court proceedings to determine the issues without a certainty of being reinstated. The applicant claimed for loss and damages to his professional reputational loss as well as for embarrassment, anguish and suffering caused by the respondents. However, the applicant provided no evidence to support his claim for distress, inconvenience, agony, embarrassment and suffering. Therefore the applicant was not entitled to claim the payment for damages and compensation for agony, embarrassment and suffering, as prayed. (paras 54 & 57)

(9) The claim for legal fees and disbursements incurred up till date, *ie*, proceedings at the High Court, Court of Appeal, leave application at the Federal Court and appeal at the Federal Court, and costs in the assessment proceedings to be as per legal fees and disbursements incurred and/or payable in respect of assessment proceedings, was not allowed. Parties were to bear their own costs for the assessment of damages. (paras 58 & 59)

Case(s) referred to:

Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd [2014] 6 CLJ 269 FC ***(refd)***

Lonrho Plc & Others v. Fayed & Others (No. 5) [1994] 1 All ER 188 ***(refd)***

Milicent Rosalind Danker & Anor v. Malaysia-Europe Forum Bhd & Ors [2012] 2 CLJ 1076 HC ***(refd)***

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Mohd Sobri Che Hassan [2020] 1 CLJ 595 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 147

Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012, regs. 27(4), 39(1)

Statutory And Local Authorities Pensions Act 1980, ss. 3(1), 9

For the appellant - Vijaya Navaratnam & Felix Lim; M/s Mureli Navaratnam

For the respondents - Karin Lim Ai Ching & Murgan D Maniam; M/s Presgrave & Matthews

Reported by Najib Tamby

JUDGMENT

Rozana Ali Yusoff J:

Introduction

[1] This judgment is delivered ensuing from the decision of Federal Court on 21 October 2019 in the case of *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Mohd Sobri Che Hassan* [2020] 1 CLJ 595 to remit this matter to the High Court of Penang for assessment and further order that the matter be fixed for case management forthwith with the following order:

A [115] Based on the foregoing, we dismiss this appeal with costs. That said, we are however minded to modify the order of the Court of Appeal as follows:

(i) Prayer (1) in terms of the respondent's application for judicial review is allowed; in that, we uphold the grant of the writ of *certiorari* quashing the decision of the first appellant to dismiss the respondent on 28 November 2013 and communicated to him on 2 December 2013. However, we make a further direction that the effect of our decision to quash shall only render the respondent in the employment of the second appellant from the date he was unlawfully dismissed on 28 November 2013 up to the date of delivery of this judgment.

(ii) We also, uphold the order of the Court of Appeal granted in terms of prayer (4) ordering that the respondent be awarded damages to be assessed. However, because this appeal is as a result of protracted litigation, we order that the assessment proceedings be heard by a judge of the High Court and not a Deputy Registrar. We accordingly remit this matter to the High Court of Penang for assessment and further order that the matter be fixed for case management forthwith.

[2] For the purpose of clarity, the Court of Appeal earlier granted the following order:

(i) that the respondent be granted a *certiorari* to quash the decision of the first appellant (prayer 1);

(ii) an order for damages and that damages be assessed by a Deputy Registrar (prayer 4); and

(iii) cost of RM20,000 to be paid by the respondent to the applicant subject to allocatur fee (prayer 5).

Facts Of The Case

[3] The applicant was at the material time employed by the second appellant as an engineer *vide* a contract of service which also incorporated and adopted the General Orders & Public Officers Regulations (Conduct and Disciplinary Rules) 1995. The first respondent is the disciplinary body and the second respondent is the Local Authority of Seberang Perai established under the Local Government Act 1976.

[4] After the confirmation of his service, the applicant was transferred from the Engineering Department to the Health Services Department. Dissatisfied, the applicant challenged the said transfer in the High Court, on the grounds that the second respondent was in breach of the employment contract as the work was not within his scope of expertise. However, the suit was dismissed by the High Court. The first respondent and its disciplinary body then initiated disciplinary proceedings against the applicant as he turned up late for work. The first respondent found the applicant guilty and

was given a warning and also a deferment of his annual salary increments for 12 months. The applicant applied for a judicial review in the High Court, but the application was dismissed.

[5] Sometime thereafter, allegations sprung that the applicant had raised the matter of his transfer to the State Assemblyman of Penang who in turn brought up the issue during the sitting of the Penang State Assembly on 5 September 2012. On 29 April 2013, the second respondent's Director of Management Services informed the second respondent's Director of Health Services that the applicant had breached the disciplinary rules in purporting to apply external influence to achieve a personal aim in contravention of reg. 4(2)(h) of the 1995 Regulations.

[6] The applicant was later charged, under reg. 4(2)(h) of the 1995 Regulations. Denying the charge, the applicant argued that, *inter alia*, he had never met the State Assemblyman and there was no need for the latter's support as he had already initiated the suit at the High Court challenging his transfer.

[7] Pursuant to a meeting dated 28 November 2013 and after deliberating on the charge and the applicant's written explanation, the Chairman of the first respondent on 2 December 2013 issued a letter informing that the applicant was found guilty and punished with dismissal from the second respondent employment. It was against his dismissal that the applicant filed the second judicial review where the High Court, holding the view that the dismissal was valid and dismissed the applicant's action.

[8] Upon appeal, the Court of Appeal allowed the applicant's appeal and set aside the decision of the High Court on the ground that the dismissal was tainted with procedural impropriety. The Court of Appeal granted the following prayers in the applicant's judicial review application:

(i) that the applicant be granted a *certiorari* to quash the decision of the first appellant ('prayer (1)');

(ii) an order for damages and that damages be assessed by a Deputy Registrar ('prayer (4)'); and

(iii) costs in the cause ('prayer (5)').

[9] On appeal by the first and second respondents, the Federal Court on 21 October 2019 dismissed the appeal with costs with modification to the order of the Court of Appeal. The Federal Court upheld the grant of the writ of *certiorari* quashing the decision of the first respondent in dismissing the applicant on 28 November 2013. However, the decision to quash shall only render the applicant in the employment of the second respondent from the date he was unlawfully dismissed on 28 November 2013 up to the date of delivery of the judgment. The Federal Court also upholds the order of the Court of Appeal in that the applicant be awarded damages to be assessed by a judge of the High Court.

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Issues To Be Tried

[10] The issues to be tried (encl. 73) are as follows:

(i) whether the applicant is entitled to claim for damages from the date of his unlawful dismissal which is from 28 November 2013 until the date
B of the decision of the Federal Court on 2 October 2019;

(ii) whether the applicant in entitled to claim for damages from the date of his unlawful dismissal which is from 28 November 2013 until the applicant is deemed to retire upon attaining the age of 60 years on 15 December 2035; and

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(iii) whether the applicant is entitled, from the date he is deemed to retire, to claim pension benefits which is payable to the applicant or his wife after the demise of the applicant.

Applicant's Particulars Of Damages

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[11] The applicant prayed to be awarded the following damages:

No	Headings	Claim Amount RM
1.	Salary & allowances from 03.12.2013 till 20.10.2019	RM 397,090.70
2.	Bonus, for the years 2013 till 2019	RM 30,944.72
3.	Salary & allowances from 21.10.2019 till 15.12.2035:	RM 1,617,892.55
4.	Bonus, from 2020 till 2035:	RM 116,586.30
5.	Damages for loss of promotion & its increment	RM 15,000.00
6	Gratuity	RM 261,464.23
7.	Golden Handshake RM 53962.44	
8.	Pension payable to Applicant RM5,216.24 permonth from 16th December 2035 till April 2040 (life expectancy of 64.4 years)	
9.	Pension payable to Applicant's wife RM5,216.24 per month from May 2040 till July 2042 (life expectancy of 66.6 years)	
10.	Embarrassment, anguish and suffering:	RM500,000.00
11.	Legal fees and disbursements incurred up till date (Proceedings in the High Court, Court of Appeal, Leave Application at the Federal Court and Appeal at the Federal Court) and costs in assessment proceedings to be as per legal fees and disbursements incurred and/or payable in respect of assessment proceedings.	

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Applicant's Submission

[12] The Federal Court did not in any of the grounds of judgment restrain or limit the assessment of damages of the applicant from 3 December 2013 to 21 October 2019 and modified the assessment proceedings to be heard by the High Court in view of the protracted litigation proceedings. The Federal Court only renders the applicant in the employment of the second respondent from the date he was unlawfully dismissed on 28 November 2013 up to the date of delivery of the judgment.

[13] The applicant is entitled as of right to the damages for the period from 28 November 2013 till 21 October 2019 and it should not be considered as compensation. As to this the applicant should be awarded as of right the sum of RM397,090.70 and the damages of RM1,617,892.55 for the period of 22 October 2019 to 15 December 2035.

[14] The Federal Court did not deprive the applicant from continuing in service based on his past misconduct as alleged by the respondents but held that an effective reinstatement is not warranted due to the background facts of this case.

[15] As to the respondents' contention that since an effective reinstatement is not warranted, the applicant was not entitled to be placed in a *status quo* position until he retires at the age of 60, the applicant submits that such contention is baseless. In view of the effective reinstatement is not available due to the surrounding facts and circumstances, the applicant should be compensated for this.

[16] Due to the unlawful dismissal, the applicant's rights to pension and gratuity have been taken away and ought to be compensated. The applicant does not fall under any category of Statutory and Local Authorities Pensions Act 1980 ('SLAP 1980') and to be considered as having retired. The SLAP 1980 has not provided for the accrual of pension, gratuity or other benefits in the applicant's favour by a "deeming action" in the event of the court limiting or restricting his employment with the second respondent upon granting a writ of *certiorari* quashing the decision of the first respondent to dismiss the applicant.

[17] As to the issues of non-pleading, the applicant submitted that it would be premature and in fact inconsistent for the applicant to plead such losses and damages especially when the applicant was praying for an order of *certiorari* to quash the respondents' decision. The losses and damages only came into picture when the Federal Court modified the reliefs granted by Court of Appeal and found that effective 'reinstatement' was not warranted. From the date of filing of the judicial review until the appeal in the Federal Court, the respondents had never raised this issue of reliefs not being pleaded in the statement of claim. In fact, the respondents had even submitted on the

merits of the said losses/damages in the Federal Court. This issue is clearly an afterthought by the respondents and they do not suffer any prejudice due to this.

[18] As to the subject of "gainful employment", the applicant has testified he only carried out some part-time work where there was no fixed income and he had been using his savings for the period of the unlawful dismissal. The applicant submitted that he is entitled to back wages from 2 December 2013 until 2 October 2019 without any deduction as he was not gainfully employed during those periods.

[19] The applicant claimed that he has suffered major embarrassment among his peers due to the alleged external influence by the applicant to advance a claim related to public service which he was ultimately punished with dismissal. Due to the unfair dismissal, the applicant has suffered emotionally as he has to attend various court proceedings to determine the issues without a certainty of being reinstated. With these circumstances, the applicant is entitled to claim the damages for embarrassment, anguish, and suffering.

Respondent's Submission

[20] The applicant is not a pensioner and has not retired from the local authority's service. The Federal Court did not decide that the applicant is deem to continue in service from the date of the Federal Court judgment until he attains the retirement age of 60. Thereafter, he is also not deemed to have retired from the service of the Local Authority and to be awarded gratuity and pension and other benefits. Hence, the applicant is not entitled for gratuity, pension and other benefits. The applicant's wife is also not entitled to pension benefits under art. 147 of the Federal Constitution.

[21] When the Federal Court modified the reliefs granted by the Court of Appeal and held that effective 'reinstatement' is not warranted and limited or restricted the applicant's employment with the second respondent from the date of his dismissal until the date of the Federal Court decision, damages to be assessed should be limited or restricted to back wages only. The Federal Court did not in the grounds of judgment order compensation *in lieu* of reinstatement from the date of its decision.

[22] It is submitted that this court "should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal". In this case, the applicant had been self-employed from the date of his dismissal to the date of the Federal Court decision. So, the fact of 'gainful employment' by the applicant during the said period should be taken into account.

[23] The respondents submitted that the employment of the applicant to date and to remain as an employee of the second respondent till the age of retirement is baseless and without any justification. The Federal Court had clearly stated that granting a *certiorari* cannot be taken as meaning "reinstatement" and upholding the grant of *certiorari*, moulded the relief and deprived the applicant from continuing in service.

[24] The provisions of SLAP 1980 are not applicable to the applicant as the Federal Court modified the order of the Court of Appeal and limited the applicant in the employment of the second respondent from 28 November 2013 to 21 October 2019.

[25] The applicant can only claim for damages from 28 November 2013 to 21 October 2019 and is subject to assessment of damages. The question of the applicant ought to be adequately compensated from the date of his dismissal till he attains the age of retirement was not ordered by the Federal Court. The applicant is not entitled to claim for future damages after the date of the Federal Court judgment.

[26] The applicant is not entitled as of right to damages for the period from 28 November 2013 till 21 October 2019 but it is still subjected to assessment of damages. The applicant is not entitled as of right to the sum of RM397,090.70 for the period of 28 November 2013 to 21 October 2019 including the back wages. The payment of full back wages is not automatic and cannot be granted mechanically. The applicant must show that he was not gainfully employed during this period.

[27] The applicant is also not entitled at all to the sum of RM1,617,892.55 for the period of 22 October 2019 to 15 December 2035.

[28] The applicant is not entitled to claim for damages for deprivation of the right to livelihood as the Federal Court had already moulded the relief which he was entitled to subject to assessment of damages. Moreover, this claim was never pleaded in the statement of claim nor was it allowed in the order of the Federal Court. The applicant only plucked the figure of RM500,000 for the loss of livelihood without submitting the basis of such figure.

[29] The contention that the applicant has legitimate expectation to be promoted has no relevance on the facts of this case as the applicant has no vested right to be promoted. The applicant is not entitled to damages for loss of promotional opportunity for the period 28 November 2013 until 21 October 2019 as he had not complied with reg. 39 of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 which provides that the promotion of an officer is based on merit. In addition, his claim in itself is speculative.

[30] Since the applicant is not in the employment of the second respondent from 22 October 2019 until he attains the age of retirement at 60 on 15 December 2035, he is not entitled to claim bonus as it is also speculative.

[31] Lastly, the applicant is not entitled to gratuity, pension and other benefits as he is not eligible under SLAP 1980.

Analysis And Finding

[32] It is trite that the court in assessing damages take into consideration three fundamental principles. They are as follows: (i) restitution *in integrum*, (ii) remoteness of damages; (iii) mitigation of damages. Further, in awarding damages, the court ensure that the applicant is not allowed to profit from it. The Federal Court in *Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd* [2014] 6 CLJ 269; [2014] 4 MLJ 465; [2014] 4 AMR 301 held:

> [32] It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him. (See s. 103 of the Evidence Act 1950). If he fails to prove both the liability and the quantum of damages, he loses the action.
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> [33] Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damage that he had in fact suffered to the satisfaction of the court. ...

[33] In this case it is axiomatic that the applicant seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. Thus, the applicant must understand that if he brings an action for damages it is for him to prove the damages. It is not enough to write down the particulars and, so to speak, throw them at the head of the court saying, this is what I have lost. I ask you to give me these damages.

[34] Prior proceeding with the assessment of damages, I took cognisance that instead of reinstating the applicant, the Federal Court intervened and modified the order of the Court of Appeal whereby the Federal Court limited the applicant in the employment of the second respondent from 28 November 2013 to 21 October 2019 having taken into account the related grounds as stated in para. 109 of the judgment. In that instance, the Federal Court stated that an effective reinstatement is not warranted on the facts of the case. From this position, I am of view that the Federal Court had already decided on the liability and allowed the applicant's judicial review for the unlawful dismissal. The decision of the Federal Court to mould the relief

after quashing the decision of the first respondent is final and not questionable. The relief granted to the applicant is clear. Since the order of the Federal Court is to solely determine the assessment of damages, I find that the issue of the claim was not pleaded does not arise.

[35] At this juncture, I am of the considered view that there is a severance of employment by the Federal Court where its decision on 21 October 2019 brought about a complete cessation of the employer and employee relationship. In the same contact, the applicant is no longer in the employment of the second respondent after the date of the Federal Court judgment. It is my view that there is no necessity for the respondents to issue a notice of termination to the applicant after the Federal Court judgment.

[36] With these in mind, the next issue is whether the applicant is entitled to claim for damages from the date of his unlawful dismissal which is from 28 November until the applicant is deemed to retire upon attaining the age of 60 years on 15 December 2035.

[37] It is worth to note that the Court of Appeal has allowed reinstatement but Federal Court did not allow an effective reinstatement. In that, the Federal Court had only granted damages to the applicant instead of reinstatement. I also took into account of the applicant submission that the Federal Court did not in anywhere in the grounds of judgment restrain or limit the assessment of damages of the applicant from 3 December 2013 to 21 October 2019 but only ordered for this matter to be remitted to the High Court of Penang for assessment of damages before a judge.

[38] Having scrutinised the Court of Appeal decision, it is clear that the damages awarded as in prayer 4 are related to the wrong dismissal where a *certiorari* was ordered. Logically speaking, the applicant's employment with the respondent continues as usual. Thus, in my opinion, at this juncture the damages awarded therefore must be in relation to the wrongful dismissal and not beyond. It is noted that on 26 March 2018, the Federal Court had granted a stay of execution of the Court of Appeal's judgment dated 12 October 2017 until the final disposal of the appeal to the Federal Court. To my mind, since there is no longer a continuity of the applicant's service as it has ceased on 22 October 2019 and also the Federal Court upheld prayer 4 of the Court of Appeal, I am inclined to view that such order for damages to be assessed is related to the employment of applicant until 21 October 2019 which is in respect of the duration of the wrongful dismissal. In other word, there is no continuity in service of the applicant after the date of the Federal Court judgment that renders the applicant to be entitled to any consequential benefits thereafter.

[39] Thus, in assessing the damages, it is not open for this court to hold that the applicant is deemed to retire upon attaining the age of 60 years on 15 December 2035 and subsequently entitled to claim for damages from the

A date of his unlawful dismissal which is from 28 November 2013 until the applicant reach the retirement age of 60 years old. Therefore, I find that the applicant is not entitled to claim for damages from the date of his unlawful dismissal which is from 28 November 2013 until the applicant is deemed to retire upon attaining the age of 60 years on 15 December 2035.

B **[40]** The next issue is whether the applicant is entitled to claim for damages from the date of his unlawful dismissal which is from 28 November 2013 until the date of the decision of the Federal Court on 21 October 2019. Following my finding above, the answer to this issue is in the affirmative. Relying back to the damages prayed for by the applicant, I made the finding
C accordingly.

[41] The Federal Court held at paras. [110 & 111] of the grounds of judgment that the principle of 'no work no pay' has not been applied by the courts in Malaysia. The Federal Court observed that the applicant ought not to be denied compensation on the basis that he did not work as it was the
D respondents themselves who unlawfully dismissed him in the first place.

Salary & Allowances From 3 December 2013 Till 20 October 2019 Amounting RM397,090.70 And Bonus, For The Years 2013 Till 2019 Amounting RM30,944.72

[42] On the score, I find that the applicant is entitled to claim the period
E from 1 December 2013 till 21 October 2019 in relation with the salary and allowances.

[43] I am mindful that pursuant to reg. 27(4) of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012, the annual salary movement of the applicant is based on his annual work
F performance. In this case, I noted that from the date of his dismissal, *ie*, 28 November 2013 and upon communication of the decision of dismissal on 2 December 2013 until the judgment of the Federal Court on 21 October 2019 there was no appraisal of the applicant's work performance in which making the applicant is not entitled to annual salary movement or annual
G increment. However, it must be borne in mind that the absence of such appraisal of the applicant's work performance was the result of the respondent wrongful dismissal and not the fault of the applicant.

[44] I am also mindful that a bonus is not automatic but subject to conditions imposed by the Federal Government or the State Authority.
H However, if the bonus were given during the period of 2013 to 2019, it is rightfully also the applicant is entitled to it, same with other employees of the respondent at the material period.

[45] In this aspect, the applicant is entitled from 2 December 2013 until
I 21 October 2019 with annual increment in the year 2014, 2015, 2016, 2017, 2018 and 2019 which amount to RM397,090.70. 36.12 and the bonus for the

year 2013 to 21 October 2019 which amount to RM30,944.72. Thus, the applicant is entitled to be paid the bonus for the year 2013 until 21 October 2019 with a total gross salary with annual increment from 2 December 2013 until 21 October 2019 including bonus which amounts to RM428,035.42.

Damages For Loss Of Promotion And The Increment In Respect Of Such Promotion

[46] Regulation 39(1) of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 provides that the promotion of an officer is based on merit. Thus, promotion is an advancement in rank, grade or both and it is at the discretion of the Promotion Board. On this score, I am of the considered view that an employee including the applicant does not have a right to be promoted since it is a matter of discretion as specified in reg. 39. The applicant claim under this heading is dismissed.

Pensions After 15 December 2035 And Salary & Bonus After 21 October 2019 Till 15 December 2035

[47] It must be reiterated that pursuant to the judgment of the Federal Court, the applicant is no longer in the employment of the second respondent. Thus, it is my opinion that the applicant is also not a retired second respondent's employee. Since, the Federal Court did not put the applicant in continuous employment on the same terms and conditions that he previously enjoyed in his employment with the second respondent, the issue of the applicant applying for early retirement or continuing in the employment until he attains the age retirement at 60 years does not arise. Therefore, I find that the applicant's claim under this heading is dismissed. It follows that as to the entitlement of his pension by his wife after the applicant's demise as claimed is also dismissed.

Gratuity From 1 July 2002 Till 15 December 2035

[48] By and large, gratuity is a payment given to the employees when they resign or retire in recognition of long and meritorious service. Gratuity is a lump sum payment and is paid only once on retirement. According to SP3, pension and gratuity is payable only if the Public Services Department is satisfied that the applicant has complied with the conditions imposed under the SLAP 1980. SP3 also quoted s. 3(1) of the SLAP 1980 which provides that "(1) No employee shall have an absolute right to compensation for past service or to any pension, gratuity or other benefit under this Act."

[49] The conditions for retirement are stated in s. 9 of the SLAP 1980 and only then the applicant is entitled to pension, gratuity and other benefits. The applicant had submitted that he is be deemed to have retired from the service of the second respondent on 22 October 2019 and entitled to such benefits after attaining the age of 60 years old in 2035. However, since there is no provision in the SLAP 1980 for payment of pension or gratuity when the

applicant ceases to be in the service of the second respondent on 21 October 2019, the applicant who will be 43 years ten months six days old on that date, is not entitled to any payment under the SLAP 1980 from the Pension Authority.

[50] It is clear that the applicant has been in the service of the second respondent from 1 July 2002 until 21 October 2019 only, which is 17 years three months 20 days. Thereafter, the applicant cannot longer be deemed to be in the employment of the second respondent. There is no provision in SLAP 1980 for payment of pension or gratuity when the applicant ceases to be in the service of the second respondent on 21 October 2019. Thus, in my opinion, the issue of the applicant being entitled to pension and gratuity does not arise as there is no "deeming fiction" in the SLAP 1980 that the pension, gratuity and other benefits accrue in favour of the applicant automatically by such fiction. In such circumstances, the applicant cannot also be deemed to be continuing in service till he attains the age of retirement. I therefore find that the damages under this heading are dismissed.

Golden Handshake

[51] Payment of Golden Handshake is paid when the employee retires at the age of 60 in regard to the unused leave accumulated up to 150 days. According to the respondents, on record, the applicant did not apply to accumulate any of his unused vacation leave for the purpose of Golden Handshake in the years 2002 to 2013. During the period of dismissal until 21 October 2019, the applicant did not accumulate the unused vacation leave for the years 2013 until 21 October 2019. The applicant can only accumulate his unused vacation leave for the years concerned for the purpose of payment of Golden Handshake provided the head of department approves it.

[52] The question here is whether the applicant is entitled to the unused leave for the period of dismissal until 21 October 2019 bearing in mind that the application for the unused vacation leave for the purpose of Golden Handshake cannot be made due to the wrongful dismissal. Due to the unforeseen circumstances which led to the unlawful dismissal of the applicant, I am of the view the applicant has been deprived of the opportunity to apply for the accumulation of the unused vacation leave only with respect of the duration from 2 December 2013 until 21 October 2019 and not beyond. Therefore, I find that the applicant is entitled to Golden Handshake subject to number of days but limited to 150 days only calculated from 2013 until 21 October 2019 of his unused maximum of 15 days/ annually. Based on the record and my calculation, the applicant for the Golden Handshake is RM12,400.80. The calculation following the formula for FCGR is 1/30 x [Last Drawn Pay + Imbuhan Tetap] x No. of days. [1/30 x [3743.74 (encl. 89) +300] x 92 days. The 92 was calculated from 1 January 2014 till 21 October 2019 = 90 days and the balance of 2 days is from 2 December 2013.

Loss Of Medical Benefits

[53] The applicant is seeking damages for loss of medical benefits entitlement amounting to RM10,000. It is not disputed that all employees of second respondent receive free medical treatment in all government hospitals and government health clinics. In any other circumstances, if the applicant has undergone medical treatment and incurred expenditure, the applicant is to produce any bills and receipts for any reimbursement which in this case is absent and not proven. I find that the claim for loss of medical benefit is dismissed.

Damages For Embarrassment, Anguish And Suffering

[54] It was submitted that the applicant has suffered major embarrassment among his peers due to the alleged external influence by the applicant to advance a claim related to public service which he was ultimately punished with dismissal. Due to the unfair dismissal, the applicant has suffered emotionally as he has to attend various court proceedings to determine the issues without a certainty of being reinstated. The applicant claimed for loss and damages to his professional reputational loss as well as for embarrassment, anguish and suffering caused by the respondents. However, the applicant provides no evidence to support his claim for distress, inconvenience, agony, embarrassment and suffering.

[55] In *Milicent Rosalind Danker & Anor v. Malaysia-Europe Forum Bhd & Ors* [2012] 2 CLJ 1076, the court held that:

> (5) It is trite law that damages for loss of reputation are not recoverable in an action founded on breach of contract. Any such claim would have to pass the remoteness rule in s. 74 of the Contracts Act 1950. It could not be said with any firm degree of conviction that the parties contemplated loss of reputation as arising from the breach of the contract. That sort of damage was far too remote. Therefore, damages for loss of reputation generally could not be claimed except in actions for defamation. No damages were therefore allowed in this regard.

[56] The court cited in *Lonrho Plc & Others v. Fayed & Others (No. 5)* [1994] 1 All ER 188, the Court of Appeal in England held:

> ... Damages for injury to reputation or business reputation or injury to feelings could only be recovered in an action for defamation, in which justification could be pleaded by way of an absolute defence, and not in an action for conspiracy and the difficulty of meeting a defence of justification could not be side-stepped by bringing an action for conspiracy to injure by lawful means. Furthermore, injury to reputation and to feelings was, with limited exceptions, a field of its own, and the established principles in that field also could not be side-stepped by alleging a different cause of action ...

[57] As the applicant led no other evidence, other than his own, to seek damages, I am satisfied that the applicant was unable to prove any loss or damages. Therefore, the applicant is not entitled to claim the payment for damages and compensation for agony, embarrassment, and suffering as prayed.

Legal Fees And Disbursements Incurred Up Till Date (Proceedings In The High Court, Court Of Appeal, Leave Application At The Federal Court And Appeal At The Federal Court) And Costs In The Assessment Proceedings To Be As Per Legal Fees And Disbursements Incurred And/Or Payable In Respect Of Assessment Proceedings

[58] Not Allowed.

[59] Parties are to bear their own costs for the assessment of damages.

[60] Interest at 5% per annum on the judgment sum to be paid from 4 April 2024 to the date of realisation.